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Supreme Court of the United States

October Term, 1969

No. 845

WOODROW YOKUM,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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Supreme Court of the United States

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

To The Honorable Chief Justice and the Associate Justices of The Supreme Court of The United States:

Petitioner, Woodrow Yokum, respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fourth Circuit entered on October 16, 1969, in Case No. 12,740, styled United States of America, Appellee, v. Woodrow Yokum, Appellant (1a).

OPINION BELOW

The opinion of the United States Court of Appeals for the Fourth Circuit appears in the Appendix hereto (2a).

No written opinion was rendered by the Trial Court.

JURISDICTION

The opinion of the United States Court of Appeals for the Fourth Circuit affirming the Trial Court in part was entered on October 16, 1969. This Court's jurisdiction is invoked under Rule 28, U.S.C., Section 1254(1) and by virtue of Rule 19(b) of the rules of this Honorable Court.

STATUTORY PROVISIONS INVOLVED

Title 18, Section 641, United States Code; Title 18, Section 2312, United States Code; Title 18, Section 2314, United States Code.

QUESTIONS PRESENTED

The Petitioner contends that the Court committed error in the trial of the case in the following respects:

1. The Court committed error in denying Defendant's request to be heard in chambers upon preliminary motions and matters which normally would be heard out of the presence of the jury.

2. The Court erred in denying Defendant's motion to suppress evidence relating to Count IV of the indictment based upon the illegality of the search warrant.

3. The Court erred in not admonishing the trial jury to ignore the newspaper, radio and television broadcasts relating to the progress of the trial.

4. The pre-indictment and pre-trial, as well as the trial publicity, available through news media created an atmosphere which so prejudiced the public that the Defendant could not get a fair trial.

5. The Court erred in failing to grant Defendant a judgment of acquittal as to all of the counts against him which were not proven by the Government, this motion having been made at the conclusion of the Government's case and again at the conclusion of all of the evidence.

6. The argument of Defendant's motion for judgment of acquittal received widespread and inaccurate newspaper, radio and television publicity and the Court's ruling thereon made out of the presence of the jury was also widely publicized.

7. The Court erred in his charge to the jury in the following respects:

A. The charge did not cover the fact that circumstantial evidence should be viewed with caution.

B. The charge relating to Count IV of the indictment improperly assumed that the possession of the property immediately after the alleged taking was in the Defendant when in fact the evidence shows that he was not in possession of the property until over one year after the alleged date of taking.

C. The charge did not advise the jury to ignore statements of the press, television or other news media in reaching their verdict.

D. By including in the charge a statement from the statute that "any property made or being made under contract for the United States or any department or agency thereof" should be considered as Government property,

which in this instance would cause the jury to believe that the statute applied to such property regardless of who had it in possession.

E. The portion of the charge indicating that the Defendant was charged with a sophisticated crime left the jury with an impression that the basic elements of a crime need not be proven for a conviction in this instance.

F. The Court's charge did not confine the jury's deliberation to consideration of elements of a Federal crime but was so general as to permit speculation based upon the inadequacies, etc., of State records and the violation of State statutes by the Defendant and others.

8. The Court committed error in admitting into evidence the Xerox copy of an alleged letter from the Defendant to Elmer West dated October 17, 1966, and in permitting the United States Attorney to use the same as an integral part of proof of guilt in his closing argument to the jury.

9. The Government in the presentation of its case failed to prove any Federal offense committed on behalf of the Defendant and specifically did not show the existence of criminal intent or knowledge on his behalf at the time of the alleged wrongdoing.

10. The title to all property and vehicles allegedy transferred, transported or sold had been transferred by the Government prior to any transportation or sale.

11. There is no showing of any acts of fraud committed by the Defendant nor of any profit or reward being received by him from his alleged actions.

STATEMENT OF THE CASE

The Defendant Yokum was an employee of the State Road Commission of West Virginia, having been given the title of Highway Supervisor. Prior to his working with the State Road Commission he had for many years been a Property Procurement Officer for the West Virginia Wing of the Civil Air Patrol, and because of his aptitude for this type of work was employed by the Road Commission to obtain surplus and excess property from the Federal Government to be used by the State Road Commission and related State agencies. During the period charged in the indictment he was a full time salaried employee of the Road Commission.

He was arrested upon a warrant issued by a United States Commissioner in February of 1967 and an indictment was returned against him at Wheeling, West Virginia, in October of 1967. Yokum was arraigned in the United States District Court on April 18, 1968, at which time he entered a plea of not guilty to the indictment and all counts thereof.

Prior to the arraignment Yokum by counsel moved for a bill of particulars pursuant to Rule 7(f) of the Federal Rules of Criminal Procedure, a portion of which was later furnished by the Federal Government.

Subsequent to this he moved for the entry of an Order directing the Government to return to him all of the property that they had seized that was not encompassed within the indictment against him, which motion was denied by the Court.

Thereafter Yokum moved under Rule 16(c) for the right of inspection and discovery of the items and documents that the Government would produce against him in this litigation and in response thereto the Government did furnish photographic copies of what it contended was all of said documents, and in return the Government moved for the

right to inspect all documents that would be used in evidence by Yokum, which motion was resisted by the Defendant and later overruled by the Court.

Other motions preliminary to trial were made by the Defendant, all of which will appear in the appendix to be filed herewith.

From the date of Yokum's arrest until the present the factual situation regarding his activities were given wide and in many instances inaccurate publicity, as will appear from the copies of newspaper items appearing from the time of his arrest up to and through the trial, which are filed as a part of the record in this action.

In detailing the facts produced at the trial regarding the indictment and the counts thereof the same will be set out herein relating to each count by its specific number and setting out the type of offense charged therein. Count VIII of the indictment was dismissed by the Court upon Defendant's motion and will not be dealt with in this presentation.

Counts I & II

Regarding the Chrysler sedan which was acquired at Fort Belvoir, Virginia, and brought to Randolph County, West Virginia. The Government for proof of Counts I and II offered the witness, Minter Rohrbaugh, Jr., who testified that he got the car and a Ford pickup for $900.00 and gave a check to Yokum for this amount. Rohrbaugh further testified that Yokum got the Chrysler car from Lt. Col. Nass and that the title for the car was also endorsed by Nass to the Beverly Auto Sales, which he operated; that this car belonged to Col. Nass, as did the pickup, and that he knew Nass.

The Government further offered the evidence of Mary De Young, an Assistant Property Disposal Officer from

Fort Belvoir, who stated that the standard Form 120 declaring the property surplus was made up in their office and sent to GSA and that they received a standard Form 122 from GSA showing the ordering agency to be the United States Bureau of Public Roads, Post Office Box 410, Buckhannon, West Virginia, and signed by Woodrow Yokum as Highway Supervisor. The Form 122 was written and had been signed by Morris Mark of GSA and the releasing document introduced by the United States Government showed that the Chrysler was turned over and shipped to the State Road Commission of West Virginia, who was the consignee. The release, which was O. K.'d by Virginia Allison, also an official in the Property Disposal Office at Fort Belvoir, Virginia, had prepared the release and a certificate of release, which was a Form 97, that transfers the title from the United States Government to the consignee, was made over to the State Road Commission and it is a document used to get title. GSA knew that the Chrysler was going to the State Road Commission and all papers were in accordance with the standard procedure and she personally knew Yokum and knew that he worked for the State Road Commission of West Virginia.

Virginia Allison, being an Assistant Property Disposal Officer, testified that she mailed Form 97 to the State Road Commission, which she herself had prepared and it was treated as a purchase order from the State Road Commission. It had been signed by Worden Fairfax as a Property Disposal Officer releasing this Chrysler to the State Road Commission of West Virginia. All of this was done in the normal course of business and in accordance with the current rules and regulations of GSA, and Fairfax as property Disposal Officer had the authority to execute the Form 97 release and this was the same procedure that they had followed for many years.

Simmons, who actually turned the 1962 Chrysler car over to Yokum on the shipping document 1149, which was regularly executed, said the car was to go to the State Road Commission of West Virginia; that he knew Yokum was an employee of the State Road Commission and knew that he had worked for them for many years.

George Bailey, a State Road employee, was introduced by the Government and testified that Yokum had been empowered by the State Road Commission to acquire surplus property from GSA and had not been given any instructions as to how he was to do this. He also stated that Defendant's Exhibit No. 3, which was a Form 97 certificate of release, was stamped with the State Road Commission stamp as received at the office at Buckhannon, West Virginia, on March 3rd. He stated that Post Office Box 410, Buckhannon, was the post office box of the Equipment Division of the State Road Commission and that the State Road Commission regularly received the pamphlets about surplus or excess property from GSA mailed to this box. He further stated that all surplus property received by the State Road Commission had been paid for and accounted for and that they had gotten a great amount of material for which there had been no charge made and that Yokum had always insisted that all inventory be listed and be placed of record. He did state that they had not received the 1962 Chrysler automobile.

Morris Mark, who signed the Form 122 for GSA, worked in Region 3, Washington, D. C., as a Utilization Officer. He stated that he and the other people who worked in GSA knew that Yokum worked for the State Road Commission and that the Box 410 was the State Road Commission's post office box in Buckhannon, West Virginia, and that he had approved many Forms 122 similarly made out showing the ordering agency as Bureau of Public

Roads, Post Office Box 410, Buckhannon, West Virginia, and that this was the same procedure that had been followed for many years and was in accordance with their normal business practices.

The Government next introduced Dallas Henke, who worked for the U. S. Bureau of Public Roads in Hagerstown, Maryland. He stated he knew nothing about the 1962 Chrysler and that Form 122 had not gone through his office in Hagerstown. He stated further, however, that the title to the property was in the GSA and that the physical control of the property was with the particular agency that had control of the property at Fort Belvoir, who had possession of the 1962 Chrysler; that the U. S. Bureau of Public Roads did not own any of this surplus property.

Worden Fairfax, the Property Disposal Officer at Fort Belvoir, Virginia, had known Yokum for five years and the 1962 Chrysler was picked up on a standard Form 122 which had been approved by GSA and that the Form 97 transferred title from the United States to the State Road Commission, was signed by him and was regular. He did state that in November, 1966, that he met Yokum in the Hunter Motel on U. S. 95 and Yokum asked him to destroy the shipping document 1149, stating that the Chrysler was hidden in a cave in West Virginia. He further stated that Yokum said nothing about destroying Forms 122 and 97 although they were all inter-related and that all Forms 122, 97 and 1149 were regular.

Collins, an employee of the West Virginia Department of Motor Vehicles, testified that according to his records the title to the 1962 Chrysler was transferred to Dallas Covey by Beverly Auto Sales and that he had no other records pertaining to the Chrysler.

The Defendant, Yokum, on direct examination detailed the procedures by which he obtained possession of the 1962

Chrysler and the proper execution of the Forms 122 and 97. He denied making the statement to Fairfax wherein he was supposed to have said that he had the vehicle hidden in a cave in West Virginia and explained that the alleged destruction of Form 1149 would in no manner conceal the transaction relating to the transfer of the motor vehicle because the Forms 120, 122 and 97 would be available in the records of the numerous other agencies that participated in the transfer. Yokum stated that the Chrysler car was picked up by him after first being offered to him by Fairfax and that before taking the vehicle he contacted Col. Nass and verified with him the fact that the vehicle could be of some use to him. According to Yokum the proper title documents were issued to him conveying this vehicle to the State Road Commission of West Virginia prior to his removal of the same from Fort Belvoir; that he took this vehicle to Alexandria, Virginia, and traded the same to Col. Nass for a used Cadillac that was to be kept in the Washington area for Yokum's use in screening and obtaining surplus property on behalf of the State Road Commission of West Virginia, Yokum having full authority to trade or exchange the surplus and excess property that he picked up for the State Road Commission as he saw fit, when such trades would work to the benefit of the State Road Commission of West Virginia. He stated that the Chrysler car was left in the lot belonging to Col. Nass and the Civil Air Patrol and title was transferred to Nass; that after the title had been transferred Nass had the vehicle brought to Beverly, West Virginia, for repairs, and that while the car was there Minter Rohrbaugh requested Yokum to contact Col. Nass to determine if this vehicle, as well as a Ford pickup truck which also belonged to Nass were for sale. Yokum contacted Nass, determined the purchase price of the two vehicles and they were sold to Rohrbaugh. The

check in payment of the same was delivered to Yokum and the title to the vehicles assigned to Rohrbaugh from Col. Nass. Yokum then at the request of Col. Nass cashed the check in payment for these vehicles and delivered the money to Nass. The testimony regarding the sale of the 1962 Chrysler vehicle and the pickup truck is borne out by the testimony of the Government's witness, Minter Rohrbaugh.

Count IV

This Court alleges that Woodrow Yokum unlawfully transported from the United States Naval Supply Depot, Mechanicsburg, Pennsylvaina, property of the United States consisting of 1,000 pairs of binoculars and that they had been obtained from the United States Naval Supply Depot by fraud.

The Government introduced Orum Yokum, uncle of Woodrow Yokum, who stated that two trailers were moved in on his farm in 1966 by State Road equipment; that the trailers were easily visible from the public highway and the smaller trailer was later moved by State Road equipment and State Road Employees but the larger one was left at his farm.

Harold Stevens, an FBI agent, testified as to serving the search warrant on Orum Yokum and helping to inventory the contents taken from the larger trailer. At this time the Defendant renewed his motion to suppress the evidence seized on this search warrant.

Edward Watkins, FBI agent, then testified as to his visit to the Yokum farm on January 19, 1967, and that he had received permission from Mrs. Yokum to inspect the trailer and that he observed it had a United States Navy serial number on it. Watkins testified that he did not know what was in the trailer prior to the issuance of the search war-

rant and did not know whether there was any United States Government property in it or not.

Connolly, an FBI agent, was called and stated that he was there when the search warrant was served and he too did not know what was inside the trailer.

Mrs. Georgia Yokum was called by the Defendant, on the search warrant issue, she being the wife of Orum Yokum, and stated that this trailer along with another one was brought on the property by State Road equipment and by State Road Employees, and that the FBI agent, Watkins, had come on their property and examined the trailer without her consent, but after examination told her that he thought there was stolen property in the trailer but he was never given permission to go on their property and that this trailer could easily be seen from the public road.

Watkins was later recalled and re-examined and the Defendant renewed his motion to suppress the evidence, which the Court overruled.

Stevens, an FBI agent, testified that there were 976 binoculars in the trailer consisting of three makes, i.e., Bausch and Lomb, Anchor and Hayworth.

Bendik, an employee at the U.S. Naval Defense Depot at Mechanicsburg; Pennsylvania, was called by the government. He was in charge of the control documents covering surplus property and was in charge of property disposal. He stated that they received a standard Form 122 from GSA authorizing them to ship to the State Road Commission of West Virginia 1,000 binoculars, Bausch and Lomb, etc., and that they were shipped to the State Road Commission with GSA approval. That it was a regular transfer, followed the normal procedure and that his shipping documents showed that they were shipped to the State Road Commission of West Virginia and that previous to the time they were picked up they had notified the State Road Commission of their release.

Morris Mark, GSA employee, stated that he had called GSA, Region 2, in New York for Yokum to see if the binoculars were available and to freeze them for the State Road Commission of West Virginia. He prepared and signed a standard Form 122 at Yokum's request; that he knew that Yokum was a State Road Commission representative; that this transfer was regular and met all requirements of GSA.

Eppinger, from the U.S. Naval Defense Supply Depot at Mechanicsburg, was called. He was the warehouse General Foreman and brought the records showing the packing slips for the binoculars for which the serial numbers were recorded and stated that they had a great many of these binoculars as excess property at Mechanicsburg.

Dallas Henke, U.S. Bureau of Public Roads, stated that the Form 122 was not made up in their office in Hagerstown; that they did not have the title of highway supervisor for any of their employees. He stated further that the binoculars were not under the control of the Bureau of Public Roads and that GSA had the right to approve Form 122 to release them to the State Road Commission.

George Bailey, State Road Commission employee, said that these binoculars had never been received to his knowledge by the State Road Commission in Buckhannon, West Virginia.

Battes, an employee at the U.S. Naval Defense Depot at Mechanicsburg, stated that they had had over 50,000 pairs of binoculars, that had been shipped to them in 1957 and 1958 and that they had been authorized in 1964 for disposal by them and were obsolete.

Weikert, who worked at the U.S. Naval Defense Supply Depot in Mechanicsburg, stated that the 1,000 binoculars were released to the State Road Commission of West Virginia and that they were regularly and properly released

and that this release was in their normal course of procedure.

Yokum testified that these binoculars were called to his attention by Morris Mark and by Col. Nass at the Washington GSA office. That Morris Mark called Region 2, New York, and froze these binoculars and later made a Form 122, signed it in the usual manner and consigned these binoculars to the State Road Commission of West Virginia. Col. Nass had told Yokum that if he got the 1,000 binoculars, which he need for CAP, that he would trade him road construction equipment for them. After the Form 122 was made out transferring these binoculars to the State Road Commission, Nass made arrangements to pick them up and further stated that Mark called Mechanicsburg and told them to notify Col. Nass when the equipment was ready for release. Yokum testified that Nass made the arrangements for the pickup and brought them from Mechanicsburg to his yard, in Alexandria, Virginia, which was the CAP's yard for the Washington area.

The following year in the fall of 1966, Yokum testified he called Nass and told him that he wanted to pick up the 1,000 pairs of binoculars because he had information that he was being checked on; that he wanted to have any property that was charged to him in his possession. Nass had the binoculars loaded on a stake truck in Alexandria, Virginia, and Yokum had one of the State Road Commission's drivers drive this stake truck to Beverly and load them into a trailer van that belonged to Col. Nass, which trailer van at that time, was located near Beverly. He stated that at the time he transferred the binoculars from the truck to the trailer van that there were by actual count 1,010 pairs and that later he moved this trailer van to the Orum Yokum farm because he was afraid someone might

break into it even though the trailer van was locked. The stake truck that he got from Nass was subsequently delivered to the State Road Commission in Buckhannon, West Virginia. In addition to the stake truck, he also obtained from CAP through Col. Nass two TD18 International Bulldozers and a crane truck which were also delivered to State Road Commission at Buckhannon.

Counts V, VI & VII

Counts V, VI and VII are interrelated in the testimony. Count V pertains to a 1962 Chevrolet Corvair that Yokum is alleged to have transported as a stolen vehicle. Count VI alleges that he transported a stolen vehicle which was a 1963 Pontiac and Count VII that he transported a stolen vehicle which was a 1962 Pontiac Bonneville and that these were all transferred from the District of Columbia to Randolph County, West Virginia.

The Government introduced William Lemck, who was Assistant Counsel of the Regional Bureau of Narcotics and Dangerous Drugs, and he prepared Forms 120 describing the 1962 Chevrolet, the 1962 Pontiac and the 1963 Pontiac and sent them to GSA, Region 3. These vehicles had all been seized by the Bureau of Narcotics. He later received shipping orders from GSA, on Forms 122, showing that the ordering agency was United States Bureau of Roads, Post Office Box 410, Buckhannon, and was signed by Woodrow Yokum as Highway Supervisor, but the cars were all consigned to the State Road Commission of West Virginia.

Morrissey, the agent in charge of the Washington Office, U.S. Bureau of Narcotics, testified that after he had been alerted by Mr. Lemck that Yokum was coming over to his office to pick up the vehicles that he prepared receipts authorizing the release from United States Government to the

State Commission of West Virginia, which receipts were taken to Kalarama Garage where these cars were stored and picked up. He stated that these receipts were prepared in this office and were all signed by Yokum. The Forms 122 approving the transfer were regular and it was a normal standard procedure.

Morris Mark, GSA employee, testified that he had approved Forms 122 for the release of the 1962 Chevrolet, the 1962 Pontiac and the 1963 Pontiac and the consignee was the State Road Commission of West Virginia, that it was in the regular course of business and the transfers were regular and that he had the authority to approve them for GSA.

Dallas Henke, Bureau of Public Roads, stated that they had no record in the Hagerstown office of the transfer of the 1962 Chevrolet, the 1962 Pontiac or the 1963 Pontiac. He further stated that property was not owned by the Bureau of Public Roads or in its possession. He was examined as to whether or not the United States Bureau of Public Roads had an office in Charleston, West Virginia, and whether they had ever communicated with the State Road Commission in 1964, 1965 or 1966 about transfer forms 122 or the transfer procedure of property going to the State Road Commission. He further stated that a new procedure had very recently been put in effect wherein GSA informed the United States Bureau of Public Roads as to any equipment released to the State Road Commission or any other state agency.

George Bailey, State Road employee, testified that the State Road Commission had no record of the receipt of the 1962 Chevrolet, the 1962 Pontiac or the 1963 Pontiac.

Collins, an employee of the Department of Motor Vehicles of West Virginia, showed that the title to the Corvair was issued to John Hill of Beverly and that the 1962 and 1963 Pontiacs were titled to Woodrow Yokum but he had

no records of the source of title for any of these vehicles at the time he testified.

Trusky, a garage owner in Philippi, West Virginia, testified that Delaine Miller brought the 1963 Pontiac to his garage, that the transmission was out of the vehicle and it is still there. He stated that the officers checked it, which was substantiated by FBA Agent Watkins. At this point Delaine Miller was questioned in detail about his intent to take the Fifth Amendment if questioned by the Government as a witness.

Bertsel Miller, father of Delaine Miller, testified that his son asked him to try out the 1963 Pontiac and that he told him the transmission was about to fall out and that he took it to Trusky's garage. That his son worked for the Department of Institutions of the State of West Virginia. The 1962 Pontiac had been towed into a nearby garage owned by a neighbor, a Mr. Paul, and had been towed there by his son, Delaine Miller.

Rohrbaugh of Beverly Auto Sales was recalled for the Government and stated that he prepared Government Exhibit 41, being an Application for Title, for the 1962 Chevrolet, at John Hill's request.

John Hill of Beverly stated that he and Gum and Eldridge who were State Road Employees, had driven the 1962 Chevrolet and two Pontiacs to the Carter House Motel Lot in Alexandria, Virginia, at Yokum's request and left them. That later he picked up the 1962 Chevrolet for Col. Nass and drove it to Elkins and was told by Col. Nass to leave it in Elkins at the State Road Commission office for repairs. That Col. Nass was a colonel in the Air Force Reserve and picked up surplus and excess property for the CAP. He also testified that he first started going with Yokum at Yokum's wife's request because of a wreck that Yokum had had leaving him in poor physical condition. He also stated

that he had known Lt. Col. Nass for several years. He got the 1962 Chevrolet at the motel lot and drove it to Elkins. He stated that he was the owner of the Chevrolet for a short time and that Nass had mailed him a form to get a West Virginia title for it and that he had paid nothing for the car. He testified further that he took the Chevrolet back to Alexandria at Nass' request and delivered it to the Charter House Motel Lot and that he called a number which had been given to him by Nass and told the people where the car was located. Later two people came to the motel lot and he gave them the title and the keys. All of this action concerning the 1962 Chevrolet being at Nass' direction. He further stated that Nass had been killed in an airplane crash in 1967. Hill came back to Elkins the next day with Woodrow Yokum after delivering the 1962 Chevrolet. He further stated that he drove the two Pontiacs from Alexandria, Virginia, to his farm in Beverly and gave the keys for them to Yokum.

With regard to these three counts, testimony on behalf of the Defendant was offiered by Delaine Miller who said that he was in charge of the acquisition of surplus and excess property for the West Virginia Department of Institutions; that he had met in the Washington area with Mr. Mark, with Institutioned Commissioner, Chauncey Browning, Jr., with Woodrow Yokum, plus various representatives of the General Services Administration. He had been advised by GSA officials that other States had been obtaining surplus and excess property for their public institutions other than their State Road Commissions and that the need for such property by the Department of Institutions of West Virginia was critical. He was further advised by GSA that such material could be picked up through the State Road Commission and by it transferred to the Department of Institutions of West Virginia, and that this

procedure would be approved by General Services Administration. That thereafter considerable surplus and excess property was picked up by the State Road Commission and traded among State agencies, including the Department of Institutions. That the two Pontiacs involved were turned over to Miller for the Department of Institutions by Yokum; that he picked them up in the Elkins area; that they had been properly released by the General Services Administration; that both were in a bad state of repair and that he had taken them to Philippi, West Virginia, for repairs pending a determination as to the public institution to which these cars would be assigned.

The Defendant, Yokum, testified that the Chevrolet and both Pontiac vehicles were picked up after obtaining proper releases from the Bureau of Narcotics, plus the GSA approval of the transfers of these three vehicles to the West Virginia State Road Commission which was given prior to the vehicles being taken into his possession. That the Chevrolet Corvair was delivered to Col. Nass at the CAP Lot in Alexandria, Virginia, and that he received in return for the use of the State Road Commission a stake body truck which was later delivered to the Buckhannon yard of the State Road Commission of West Virginia. Yokum stated that this trade with Nass followed the usual practice of trading for material that was a benefit to the State Road Commission; that after the Chevrolet Corvair was delivered to the lot in Alexandria, Virginia, he had no further connection with it or had no knowledge of its ultimate disposition.

With relation to the two Pontiacs which were transported to Beverly, West Virginia, and from there delivered to Delaine Miller, as the representative of the Department of Institutions, the titles to these vehicles were retained by Yokum awaiting the repair of the vehicles and their de-

livery to the particular public institution designated by the Department.

Chauncey Browning, who at the time was Commissioner of Institutions, corroborated the testimony of Yokum with regard to Yokum and Miller meeting with him and officials of GSA in Washington, D. C., as well as with United States Senator, Robert Byrd, on the subject of obtaining surplus or excess Government property for use of various institutions located in the State of West Virginia. He testified that he met with GSA officials; that Yokum had obtained large amounts of property for his particular branch of the State Government that was turned over to that branch through their property procurement department headed by Delaine Miller.

Count IX

Count IX alleges that Yokum sold a 1951 Ward La France fire truck belonging to the United States which was the property of the United States and which had been stolen from them. The Government introduced Daniels, a mill foreman who had been Assistant Fire Chief of the Tygarts Valley Fire Department in 1964 and was now the Chief of the Beverly Fire Department. He had known Yokum for 25 years and had asked Yokum to help them acquire another fire truck, and that Yokum had gotten them a fire truck in the year 1960. He stated that Yokum told him that he would have to check with Col. Nass about acquiring this Ward La France fire truck. He further stated that the fire department borrowed $5,000.00 from the Citizens National Bank of Elkins and that Yokum was one of the consigners of the note along with other members of the Fire Department. He further stated that Yokum had told him he would have to check with the owner of the fire truck before he could find out about the price and whether

it could be sold. This truck was originally purchased by the Tygarts Valley Fire Department and later transferred to the Beverly Fire Department.

Nitz stated that in the minutes of the meeting of July 29, 1964, the Tygarts Valley Fire Department decided to buy a fire truck and get a loan from the Citizens National Bank for $5,000.00; that they did buy a Ward La France fire truck and that they gave the check for $5,000.00 in payment of the same to Yokum on August 14, 1964, although they had had the truck for some time before that.

Vanscoy, Executive Vice President of the Citizens National Bank, identified a Cashier's check issued on August 14, 1964, and cashed for cash on September 9, 1964, at the Davis Trust Company in Elkins, as the proceeds of the $5,000.00 loan.

Collins, an employee of the West Virginia Department of Motor Vehicles, testified that a title for a 1957 Ward La France fire truck was issued first to the Tygarts Valley Fire Department and later transferred to the Beverly Fire Department; that the West Virginia title was issued in a Form 97 release of title which was received from the CAP, 100 East Cliff Street, Alexandria, Virginia, and that this Form 97 was signed by E. D. Nass, Jr., Lt. Col., on May 25, 1964, and that the Form 97 was a certificate of release from the United States to the CAP. The title was for a 1957 Ward La France and not a 1951 Ward La France fire truck.

Daily, an employee of Fairchild Aircraft, Hagerstown, stated that the Government loaned them equipment and when it was no longer needed they would notify the United States Government of this and the Government would retake possession of it, that they did notify the United States Government they no longer needed the 1951 Ward La France and that on a Form 1149, which is a requisition

and shipping document, that this 1951 Ward La France was shipped and transferred to CAP, 501 Seventh Street, Washington, D. C., Attention Col. Woody Yokum, on January 1, 1964.

Worden Fairfax, Property Disposal Officer, Fort Belvoir, testified that his records reflect the transfer of the Ward La Francee fire truck to the CAP and that the transfer was in proper form and in compliance with their regulations. His records further reflect that the vehicle was transferred back to Fort Belvoir on the same day and that though he never saw the vehicle he assumes this to be merely a paper transaction; that sometime thereafter this 1951 Ward La France vehicle was reported as scrap and was sold in a consignment of 250,000 pounds of scrap metal to Irving Miller, a local salvage dealer, and that the Government received $1,500.00 for this quantity of scrap metal.

The Defendant, Yokum, testified that he obtained a 1957 Ward La France fire engine from Col. Nass, Property officer of the Third Region of CAP, Washington Wing; that this vehicle was transported to Beverly, West Virginia, and turned over to the Tygarts Valley Fire Department for its approval; that the vehicle was altered by the Fire Department to meet the requirements of the West Virginia State Fire Marshal's Office and that thereafter at the request of the Tygarts Valley Fire Department he contacted Col. Nass, who advised him that the CAP would sell this vehicle for the price of $5,000.00. Yokum testified that he, being a member of the Tygarts Valley Fire Department, endorsed the note with other members of the Fire Department as security for the loan with Citizens National Bank, the proceeds of which were used to pay CAP for the truck. He stated that he offered Nass a Cashier's check; that Nass refused the same and required him to get the check cashed and deliver the money to him. The vehicle that was sold

in this instance being a 1957 Ward La France fire truck and that this fire truck is now held by the Beverly Fire Department, who obtained the transfer from Tygarts Valley Fire Department, and is a 1957 Ward La France fire engine.

Count X

Count X alleges that Yokum transported a stolen vehicle consisting of a 1953 FWD fire truck from Norfolk, Virginia, to Randolph County, West Virginia, knowing the vehicle to be stolen.

Daniels, Fire Chief for Beverly Fire Department, stated that Yokum told the fire department that if they fixed up this FWD fire truck they could use it and he would loan it to them but he could not sell it to the fire department.

Herman Barnes, Disposal Officer, United States Navy Supply Center, Norfolk, Virginia, testified that Form 122 for the FWD fire truck carrying Serial No. 400881, was properly executed and that when the truck was picked up from his yard Form DD1148, being a Navy form prepared by his office, transferred this fire truck to the State Road Commission of the State of West Virginia. He stated that the actual pick-up of the truck was at Cheatam Annex, Williamsburg, Virginia, and that the truck was in bad state of repair. The estimated cost of repair of this vehicle was $4,500.00. This witness further testified that no charge was made for this vehicle and that the appropriate release document was received from General Services Administration and was approved on June 22, 1966, seven days prior to the date the truck was turned over to the State Road Commission of West Virginia.

Morris Mark of General Services Administration testified that the documents transferring this equipment were in order; that no charge was made for this item and that

the vehicle was consigned to the State Road Commission, Equipment Division, Buckhannon, West Virginia.

Mr. Henke of the Bureau of Public Roads testified that the records in his office did not reflect that the United States Bureau of Public Roads at Hagerstown, Maryland, was the ordering agency for this transfer and that they had no records regarding the transfer of this particular truck.

The Defendant Yokum testified that the original acquisition price of this vehicle was $7,768.00; that the Form 120 shows its physical condition to be R-4, which is the lowest classification next to scrap; that the Government's estimated cost of repairing the vehicle was $4,500.00; that it had a speedometer reading of 10,243 miles and that it had been requested by the Virginia Division of Forestry according to a notation appearing on the Form 122. Yokum said that since he had inquired about the truck prior to the request by the Virginia Department of Forestry, the General Services Administration officials executed at his request a standard Form 122 releasing the property to the State Road Commission of West Virginia; that he picked up the truck and delivered it to Beverly, where it is now in the garage of the Beverly Fire Department upon loan to them, the same being property of the State Road Commission of West Virginia. He further stated that it was customary for the State Road Commission to pick up fire fighting equipment for municipalities and other governmental units in the State of West Virginia; that this practice had been followed on prior occasions and had been approved by both State and Federal institutions involved in such transfers.

Count XI

This Count charges Yokum with transporting a 1958 Chrysler, Serial No. LY1-9744, from Alexandria, Virginia,

to Philippi, West Virginia, knowing it to be a stolen vehicle.

The Government introduced John Hall, Disposal Officer at Cameron Station, which is located in Alexandria, Virginia. He had known Yokum for approximately four years as a West Virginia State Highway Supervisor. Hull made out the standard Form 122 for the 1958 Chrysler Serial No. LY1-9744, showing the ordering agency as United States Bureau of Public Roads, Post Office Box 410, Buckhannon, West Virginia, and the same was signed by Yokum, Highway Supervisor. The warehouse delivery slip was received on October 4, 1965. He stated the Form 122 was prepared in his office and that he did this for many people and had for years; that the GSA would approximately once a month sign all of the Forms 122 that his office had issued. He stated that the control of this property was in the Army and it was turned over before GSA had approved it; that this was standard procedure and it later had been signed by GSA approving officer; that he had been told that he could release the property to the State of West Virginia and did not have to go to the GSA for approval.

So far as Hall and his office were concerned the United States Bureau of Public Roads and the State Road Commission were one and the same; that he didn't remember whether he gave Yokum a Form 97 but it was normal to give one to anyone who got a motor vehicle; that his agency had the authority to release excess property without charge.

The Court on pages 618 and 619 of the record made remarks to the jury which were prejudicial about this witness. Later the Court indicated to defense counsel out of the hearing of the jury that Hall had not testified the way the Government thought he should and implied that the Government should indict him for perjury. Hall stated that he knew that this equipment was going to the State Road Commission and that he didn't know anything about the

Federal highway regulations and had been following this same procedure for many years.

Henke of the U.S. Bureau of Public Roads was called and stated that the Form 122 for the 1958 Chrysler did not go through his Hagerstown office and that he was not familiar with Cameron Station or how they transferred property. He also stated that the U.S. Bureau of Public Roads had its district headquarters in Charleston, West Virginia, had daily contact with the State Road Commission, was connected with the radio network of the State Road Commission and even had a base radio station in Berkeley Springs, West Virginia, which was located reasonably close to Hagerstown, Maryland. He also stated that Yokum had a radio in his automobile on this State Road Commission network.

Collins, employee of the Department of Motor Vehicles of West Virginia, stated that the title for the 1958 Chrysler Serial No. 912568022 was issued to Chauncey Browning, Jr., on transfer from Delaine Miller of Philippi. This serial number did not correspond to Serial No. LY1-9744. No source of title for Delaine Miller to this vehicle was located in his office.

Thompson, an FBI agent, talked with Browning and received his permission to examine the 1958 Chrysler and the serial number on it was LY1-9744.

Chauncey Browning testified that this motor vehicle had been given to him by Delaine Miller, who was the Property Acquisition Officer for the West Virginia Department of Institutions; that the vehicle was delivered to him in Charleston, West Virginia, by Miller and that he had no information as to how the vehicle had come into Miller's possession. Delaine Miller testified that he acquired the Chrysler sedan from Lt. Col. Nass at the CAP lot in Alexandria, Virginia, and drove it to West Virginia; that the

vehicle was in a very poor state of repair and that Nass had turned it over to Miller at no charge for his use as Property Acquisition Officer for the Department of Institutions.

Yokum testified that this Chrysler automobile was first called to his attention by either John Hall or Carl Black, who were Property Disposal Officers at Cameron Station; that at the time he knew that Nass and Civil Air Patrol had three or four other Chrysler cars similar to this one on their lot at Alexandria, Virginia, and with this in mind, he obtained a Form 122 for the same, took the vehicle to the CAP yard in Alexandria and turned it over to CAP, leaving the vehicle in Alexandria. In exchange for this vehicle, Yokum received for the State Road Commission a pickup truck that he later delivered to the equipment yard of the State Road Commission at Buckhannon, West Virginia. After leaving the Chrysler in Alexandria, he had no further contact with the same and did not know of its whereabouts.

It is apparent from both the government's and the Defendant's testimony that was offered that the government's contention in this case is based on what they allege is the manner in which Forms 122 were issued, with the exception of Count 3, which they admit was a proper Form 122 The testimony produced throughout the trial clearly shows that Forms 122 had been for many years issued by GSA showing the ordering agency as United States Bureau of Public Roads, Post Office Box 410, Buckhannon, West Virginia, with the consignee as the State Road Commission. Numerous Forms 122 were produced at the trial by the Defendant to show that Evans, the Chief of Utilization of GSA, and many other utilization officers of GSA signed these forms and all stated that it was normal and regular and in the usual course of their business.

Yokum testified that these Forms 122 were prepared at GSA offices; no one in the course of the trial disputed this statement except to say that they themselves did not prepare them even though they did admit that these blank forms were available in their office. The evidence clearly reflects that all of the officials in GSA knew, and the various property disposal officers knew that Yokum was a State Road employee who was charged with getting surplus and excess property and all of the property acquired by him was consigned to the State Road Commission. No witness testifying for the government indicated that he was mislead by Yokum or the manner in which the Forms 122 were prepared. That each of them when asked testified that they knew that Woodrow Yokum represented the State Road Commission of the State of West Virginia and that the equipment that he would obtain upon the Form No. 122 was consigned to the State Road Commission of West Virginia. In addition, Form 97, which was issued for these vehicles was a complete release of the vehicles from the United States Government to the consignee as reflected by the statement contained on the back portion of each Form 97.

When the Defendant called Sgt. Burner of the West Virginia State Police, who had made a thorough investigation of the Yokum matter, he said he could find no violation of any law or that Yokum had not accounted for all State property. The same was true of Roy Coen, who had made an investigation of this situation on behalf of the State Road Commission. In fact, it was shown that the State Road Commission had received 716 pieces of equipment from the United States Government, some 75 to 80 pieces of equipment of which they had no record and they had not made any payment for this extra equipment.

The testimony of Mrs. Graziana, who was in charge of the records at the Equipment Division of the State Road Commission at Buckhannon, was to the effect that Yokum had consistently requested that all surplus property he brought in be inventoried and placed of record as soon as possible. Both Eldridge and Gum, State Road employees, testified that frequently items of surplus property were lost and not placed on the inventory record for as much as a year at a time at the Equipment Divisions yard, for example, a lowboy and two truck beds.

Col. Gobbell, Wing Commander of West Virginia CAP, testified that Yokum had been the procurement officer for the West Virginia Wing and had always accounted for all surplus property obtained by him. He further stated that a Wing Commander of the CAP had the right to sell or exchange property, surplus or excess, under rules and regulations which procedure Yokum stated that he assumed Nass had followed in the exchange and sale of property with him.

Yokum offered numerous character witnesses who testified to his good reputation, even after this indictment had been returned and he had been tried in the newspapers throughout the State. Throughout the entire proceedings the Government made a continual attempt to harrass its own witnesses by bringing their supervisors into the Court room to listen to the testimony of the government employees, and an FBI agent, Crowder, who was investigating Yokum on a matter pending in another jurisdiction, was present in the court room during a portion of the trial, and at the time they were to call Delaine Miller as a government witness, the United States Attorney asked that the Court instruct him as to his rights under the Fifth Amendment, which he had previously taken at a trial in Norfolk, Virginia, at the direction of his counsel, when they were

not able to be present and were not familiar with the issues involved other than that they dealt with surplus property.

Immediately after the witness, Hall, testified the Government refused to excuse him and discussed with the Court in the presence of defense counsel the possibility of indicting Hall for perjury.

In addition to all of this the Court, although requested to do so by defendant's counsel, never at any time admonished the jury not to read the newspapers or listen to radio or television concerning coverage of this trial. The Court's rulings made in the absence of the jury were reported in all news media, including the statement by the Court that this case involved the commission of a sophisticated type of crime, which phrase was later used by the District Attorney in his closing argument to the jury and was discussed in the Court's charge.

Prior to trial the defense timely made a motion under Rule 16c for the production of all papers, records and documents that the Government intended to use at trial. This request was complied with substantially by the Government, however, with relation to a letter allegedly written by Yokum and addressed to Elmer West, his supervisor with the State Road Commission, which letter was dated October 17, 1966, this letter was not shown to the defense but was first brought to light when it was presented to the Defendant while on cross-examination on May 28, 1968. The defendant was cross-examined upon this letter over objection of the defense and on May 29, this letter, which consisted of a photographic copy of an unsigned copy of a purported letter, was admitted in evidence by the Court over objection of the Defendant, for the sole purpose of credibility. Never at any time was the original of this letter produced or its absence explained. During the course of

the argument of the case to the jury the letter was referred to and discussed on three separate occasions by the United States Attorney in relation to material facts outside of the question of credibility. The witness, West, to whom the letter was addressed, did not know where the original was or whether he had ever received it or whether Yokum had ever sent or signed such a letter.

REASONS FOR GRANTING THE WRIT

1. The Motion To Suppress The Search Warrant Should Have Been Sustained.

The motion to suppress relating to Count 4 should have been sustained by the District Court because it is clear from the testimony of the Agent, Watkins, adduced at the trial that he did not know when he signed the search warrant that there was any Government property that was contained in the trailer. In addition the search was of general exploratory nature and was not made incident to an arrest. The property seized, the binoculars, were not particularly described in the search warrant. The Government and the trial Judge relied heavily on *U.S.* v. *Rabinowitz,* 70 S. Ct. 430, 339 U.S. 56, 94 L. Ed. 653, *Harris* v. *U.S.* 10th Circuit, 151 Fed 2d 837, which was specifically overruled in the case of *Chimel* v. *State of California,* 23 L. Ed. 2d 685, 89 S. Ct. ....., which was decided on June 23, 1969. The evidence of Watkins was insufficient and not based on facts within the knowledge of the affiant and the search was of a general exploratory one.

Trupiano v. *U.S.,* 1948, 68 S.Ct. 1299, 224 U.S. 699, 92 L.Ed. 1663.

U.S. v. *Lefkowitz,* 1932, 52 S.Ct. 420, 275 U.S. 452, 76 L.Ed. 877, 82 A.L.R. 755.

Go-Bart Importing Co. v. *U.S.* 1931, 51 S.Ct. 153, 282 U.S. 344, 75 L.Ed. 374.

Gouled v. *U.S.*, 1921, 41 S.Ct. 260, 255 U.S. 298, 65 L.Ed. 647.
Weeks v. *U.S.*, 1914, 34 S.Ct. 341, 232 U.S. 383, 58 L.Ed. 652.
Boyd v. *U.S.*, 1886, 6 S.Ct. 524, 116 U.S. 616, 29 L.Ed. 746.
U.S. v. *Rabinowitz*, N. Y. 1950, 70 S.Ct. 430, 339 U.S. 56, 94 L.Ed. 653, Cert. denied 70 S.Ct. 188, 338 U.S. 886, 94 L.Ed. 544.
Lowrey v. *U.S.*, C.C.A. Ark. 1947, 161 Fed. 2d 30, Cert. denied, 67 S.Ct. 36, 331 U.S. 849, 91 L.Ed. 369.
U.S. v. *Kelley*, D.C.N.C. 1921, 277 F. 485.
Atlanta Enterprises v. *Crawford*, D. C. Ga. 1927, 22 F.2d 834.
Marron v. *U.S.*, Cal. 1927, 48 S.Ct. 74, 275 U.S. 192, 72 L.Ed. 231.
U.S. v. *Doe*, D. C. Tenn. 19 F.R.D. 1.
"Federal Practice and Procedure," Barron & Holtzoff, Vol. 4, Sec. 2402.
Chimel v. *State of Calif.*, 23 L. Ed. 2d 685, 89 S.Ct.

2. Adverse Publicity Given Defendant Prior To And During Trial Deprived Him Of A Hearing Before An Impartial Jury.

The Defendant, Yokum, was arrested in February of 1967 and at that time the newspapers, copies of which have been filed in this case, reflected that the Government seized large quantities of property belonging to Yokum and said that the same had been received by him from illegal activities on his part as an employee of the State Road Commission. From the date of his arrest to his indictment and through the trial to his sentencing the press gave him wide publicity, as well as did other news media, all of which was unfavorable to him and in all news releases where any mention was made of Yokum's name there was inserted a statement to the effect that he was charged in Federal Court, both here and in other jurisdictions, with obtaining

in excess of $300,000.00 worth of Government property. Yokum was not charged in the indictment nor did the evidence show that he had received this amount of property, and the trial Court although repeatedly requested to do so by the defense did not admonish the jury not to read the local papers or listen to local news reports.

PUBLICITY ADVERSE TO THE DEFENDANT

A. Where the jurors had access to and had read prejudicial articles in local newspapers commenting upon the trial and they had not been specifically admonished to disregard such publicity the Court should grant a new trial to the defendant.

People v. *Murawski,* 394 Illinois 236, 68 N.E.(2d) 272.
State v. *Barille,* 111 W.Va. 567 (syl.1).
31 ALR (2d) 417.
Sheppard v. *Maxwell,* 384 N.S. 333.
In Re Murchinson, 349 U.S. 133.
White v. *Maryland,* 373 U.S. 59.
Gideon v. *Wainwright,* 372 U.S. 335.
Offutt v. *U.S.,* 348 U.S. 11.

B. Where the actual effect of publicity is such that a conviction is inherent as result of it the Court should grant Defendant a new trial.

Rideau v. *Louisiana,* 373 U.S. 723.
Turner v. *Louisiana,* 379 U.S. 466.
Estes v. *Texas,* 381 U.S. 532.

3. The District Court Erred In Failing To Grant The Defendant's Motion For Judgment Of Acquittal On All Counts Against Him Which Were Not Proven By The Government.

The evidence clearly shows that the procedure used by Yokum was that outlined to him by General Services Ad-

ministration, it being the Government agency that had title to the property and also the holding agency who released the property through its employees who testified and stated that Yokum followed a correct procedure and it was regular. In addition this procedure was the one outlined by General Services Administration and the majority of the documents were prepared in the office of the General Services Administration by their employees. At no time were any regulations or statutes introduced to the effect that it was necessary to go through the Bureau of Public Roads in order to get release of this property. The Bureau of Public Roads did not have title to it and the only evidence that the Government introduced was that of the witness Henke. Yokum was known to be an employee of the State Road and was a highway supervisor for it. The address given, Post Office Box 410, Buckhannon, West, Virginia, was known by all parties to be the post office address of the Equipment Division of the State Road Commission of West Virginia. In addition it was shown that the State Road Commission received some seventy-five articles or more that it did not have any evidence of title to. The question of the source of West Virginia title had no bearing on the guilt or innocence of Yokum and it was not proper to be introduced in this trial. One of the items, the 1951 Ward La France fire truck covered under Count 10, was shown by the Government's own evidence to have been sold for scrap and the Government received pay for this item, yet the Government contends that this item was stolen by Yokum and sold. The evidence further shows that any money received by Yokum was turned over to Colonel Nass, as reflected by the testimony of Rohrbough pertaining to the title of the Chrysler car charged in Counts 1 and 2 and also as pertaining to the fire truck, which was a 1951 Ward La France fire truck. In addition, as stated by several of the

witnesses, the equipment which is charged in these various counts was of no value and no charge was made by the Federal Government for its release. To hold that Yokum by-passed proper procedure is not in accordance with the testimony offered by the Government.

EVIDENCE

1. Conviction cannot be had upon evidence which is consistent with both innocence and guilt.

Weeks v. *U.S.*, 10 C.A. 313 Fed. 2d 688.
Cert. denied, 373 U.S. 922, 83 S.Ct. 1523, 10 L.Ed. 2d 421.
U.S. v. *Martin*, 375 Fed. 2d. 456.

2. Circumstantial evidence because of its nature should be scanned with caution and great care.

State v. *Gunnoe*, 74 W.Va. 741.
State v. *Bennett*, 93 W.Va. 548, 117 S.E. 371, see Syl. No. 2.
State v. *Dudley*, 96 W.Va. 481, 123 S.E. 241.
State v. *Maley*, 151 W.Va. 593, 153 S.E.2d 827, Syl. 1 & 2.
Stubbs v. *U.S.*, 2 Fed. 2d. 468.

3. Requirement of proof and reasonable doubt.

Rule 52(b).
Screws v. *U.S.*, 325 U.S. 91, 65 S.Ct. 1031, 89 L.Ed. 1495.
Byrd v. *U.S.*, 119 U.S. App. D.C. 360, 342 F.2d 939.
Apodaca v. *U.S.*, 188 F.2d. 932.
Forte v. *U.S.* (D.C.C. of A) 94 F.2d. 236, 127 A.L.R. 1120.

Stutz v. *U.S.*, 47 Fed. (2d) 1029.
Anderson v. *U.S.*, 30 Fed. (2d) 485.

Criminal Intent

Criminal intent is a necessary element of larceny described in U.S. Criminal Code.

U.S. v. *Lamb*, (1957) 150 Fed. Supp. 310.
Findley v. *U.S.*, (1966) C.A. Colo. 362 F.2d. 921.
Halfen v. *U.S.*, (1963) C.A. Okla., 324 F.2d 52.
Morrissette v. *U.S.*, 324 U.S. 24, 72 S.Ct. 240, 96 L.Ed. 288.
Souza v. *U.S.*, 9th Cir. 304 F.2d. 274.

Willful, when used in a criminal statute, it generally means an act done with a bad purpose.

An evil motive to accomplish that which the statute condemns, becomes a constituent element of the crime.

U.S. v. *Murdock*, 290 U.S. 389.
Felton v. *U.S.*, 96 U.S. 699.
Potter v. *U.S.*, 155 U.S. 438.

Elements of Dyer Act

To convict the defendant of transportation of stolen property in interstate commerce there must be three essential elements to obtain a conviction.

(1) that the vehicle was stolen.

(2) that there was transportation in Interstate Commerce; and

(3) that such transportation was with the knowledge that the vehicle was stolen.

The government must prove each of these elements by substantial evidence from which the jury could properly find the accused guilty beyond a reasonable doubt.

U.S. v. *Martin* (1967) C.H. Tenn. 375 F.2d. 956.
Maguire v. *U.S.* (1966) C.A.N.M. 358 F.2d. 442.

Conviction for knowingly transporting a motor vehicle across a state line requires a showing of the common law crime of larceny requiring trespass or relinquish of title without the consent of owner.

Hand v. *U.S.* (1955) C.A. Colo. 227 F.2d. 794.
Tyler v. *U.S.* 323 Fed. 2d. 711.

It is incumbent upon the government to prove, among other things, that the transportation in interstate is accomplished with an unlawful and fraudulent intent.

Weeks v. *U.S.*, 10 C.A. 313, F.2d. 688.
Cert. denied, 373 A.S. 922, 83 S.Ct. 1523, 10 L.Ed. 2d. 421.

4. The Court Erred In Refusing Defendant's Request That The Jury Be Instructed Specifically Regarding The Dangers And Shortcomings Of Circumstantial Evidence And In Advising Them That Such Evidence Should Be Scanned With Caution.

In this connection the Trial Court and the Court of Appeals took the position that the case of *Holland* v. *U.S.*, 348 U.S. 121, 99 L.Ed. 150, held that such an instruction regarding circumstantial evidence was not required. Upon a review of this case it is to be noted that while the Holland case did hold that a charge on circumstantial evidence would not be required in that instance in event the Court had fully and completely instructed the jury upon the principles of reasonable doubt. In the instant case the Judge of the Trial

Court, as appears in the Appendix, did not fully and adequately instruct the jury upon the standards for reasonable doubt so as to relieve it of the necessity of making such charge upon the question of circumstantial evidence. The charge as given by the Court not only did not cover the reasonable doubt theory fully but in effect what little was said about circumstantial evidence tended to place circumstantial evidence in a much more reliable position that it is at law entitled. The basic premises in a charge of circumstantial evidence that it should be scanned with caution and must exclude every reasonable hypothesis other than that of guilt was not included within the Court's charge in this proceeding.

5. The Court's Charge Did Not Confine The Jury's Deliberation To The Elements Of A Federal Crime But Was A Charge Of Such A General Nature As To Permit Unlimited Speculation Based Upon The Inconsistencies And Inadequacies Of State Government Records And Items Which Might Constitute A Violation Of State Statutes By The Defendants And Others.

This omission from the charge was particularly damaging to the Defendant in view of the fact that the Court had admitted over Defendant's objections evidence which was irrelevant but related to possible violation of State regulations and statutes.

6. The District Court Committed Error In Permitting The Government To Introduce A Xerox Copy Of A Copy Of A Letter Which Was Unsigned And Which Was Alleged To Be A Letter From The Defendant, Yokum, To Elmer West Dated October 17, 1966, And In Permitting The United States Attorney To Use The Same As An Integral Part Of The Proof Of Guilt In His Closing Argument.

A particularly glaring error committed by the Trial Court in this case was the admission of a Xerox copy of an unsigned copy of a letter addressed to Elmer West, who was

Yokum's immediate supervisor, which letter was dated October 17, 1966, and which letter the Defendant denied ever writing or having any knowledge of. The Government did not excuse or account for the absence of the original of this letter. The letter dealt with different subjects on the first and second pages. West when questioned did not recall ever having received the original or knowing whether such a letter had ever been written. The evidence was that the United States Attorney's office had the letter at least two days prior to its introduction. It had not been shown to counsel for Yokum in compliance with Rule 16(c) and when it was admitted by the Court over the objection of the Defendant it was supposed to be only as to his credibility, however, the United States Attorney used this letter as a basic part of his presentation to show the Government's proof of the Defendant's guilt and referred to it specifically on at least three separate occasions and in no way used it as to the question of credibility of the Defendant. This letter in itself of necessity had to have a decided effect upon the jury's consideration of the guilt or innocence of the defendant because of the contents therein.

ADMISSION OF COPY OF UNAUTHENTICATED LETTER

A. The authenticity of a letter or private writing must be clearly established before it can be admitted in evidence.

29 A.J. 2d "Evidence," Sections 849 and 879, 486 to 491 incl.

Grossman v. *U.S. Slicing Machine Co.*, 365 Fed. (2d) 687 (3rd Circ.)

Adams v. *Hotel Sherman, Inc.*, 138 Fed. (2d) 524 (7th Circ.)

Prevast v. *U.S.*, 149 Fed. (2d) 747 (9th Circ.)

B. The truth of the original document must first be established and its non-production excused before a copy of the writing is admissible.

Smith et al. v. *Carrington,* 4 Cranch 63, 2 Law Ed. 550.
Cobb v. *Glenn Boom & Lumber Co.,* 57 W.Va. 49.
Campbell v. *U.S.,* 373 U.S. 487.

7. The Fourth Circuit Court's Opinion And Judgment That The District Court Did Not Err In Its Ruling Except As To Count 3 Of The Indictment And Overrulnig All Other Errors Assigned Is Not Supported By The Applicable Principles Of Law And Evidence.

Although Petitioner relies on other errors assigned to the Court of Appeals and believes such assignments are sound, Petitioner does not believe it necessary to elaborate upon the same at this time, however, if the Court desires further elaboration upon such errors Petitioner will comply forthwith.

It is substantially the Petitioner's position that the violations charged against the Defendant basically require the Government to show that at the time of the alleged offense the title to the property was in the Government. In the trial of this case it was clearly shown that as of the time any of the items of Government property were taken into possession by the Defendant or transported by him that the title to the property had already been assigned to the State Road Commission of West Virginia and was not the property of the Federal Government.

It is counsel's contention that the errors assigned with regard to the matter of publicity, the Court's ruling on the search warrants, the improper admission of the photograph of the unsigned copy of a letter, and the errors in

the Court's charge are sufficient upon which to have this case reviewed.

CONCLUSION

For the reasons assigned the Petitioner prays that the Petition for Writ of Certiorari should be granted and that the writ issue to review the opinion and judgment of the Fourth Circuit Court entered in Case No. 12,740 on October 16, 1969, as aforesaid.

Respectfully submitted,

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